(9)

No. 95-566

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

JAMES ALLEN EGELHOFF,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL), headquartered in the District of Columbia, is a nationwide, nonprofit, voluntary association of criminal defense lawyers. Founded in 1958, it has a membership of more than 8,000 attorneys. Through cooperation with sixty-eight state and local criminal defense organizations, moreover, the NACDL speaks for more than 28,000 lawyers. It is the only national bar organization working for public and private criminal defense attorneys. It is an affiliated organization of the American Bar Association with full representation in the ABA House of Delegates.

The NACDL is dedicated to preserving and improving our adversary system of criminal justice. Among its goals are the promotion of fair administration of criminal justice; the protection of individual rights; and the improvement of the criminal law, its practices, and its procedures. As it does in this case, it appears frequently as *amicus curiae* to aid this Court in resolving issues that implicate those goals.

Both parties consented to the filing of this brief, as reflected in letters lodged with the Clerk of this Court.

STATEMENT OF THE CASE

Respondent James Allen Egelhoff spent most of July 12, 1992, drinking in bars and at a party in Lincoln County, not far from Montana's Idaho and British Columbia borders. *See Montana v. Egelhoff*, 900 P.2d 260, 261 (Mont. 1995); Tr. 1127:19-1130:18. About 9 p.m. he left the party with Roberta Pavola and John Christianson, who drove them away in Christianson's station wagon. 900

P.2d at 262; Tr. 1127:19-1130:18. Twenty minutes later respondent and Christianson – but not Pavola – bought beer at a grocery store. 900 P.2d at 262; Tr. 980:25-981:14, 1002:6-17.

Little is known about what happened the next two-and-a-half hours, until shortly before midnight, when Christianson's station wagon careened off a highway. 900 P.2d at 262; Tr. 291:14-292:23, 431:20-432:6. In the front seat were found Christianson and Pavola, each dead from a bullet to the head. 900 P.2d at 262; Tr. 301:9-310:20, 153:16, 170:1. On the floorboard near the brake pedal lay a .38-caliber pistol that belonged to respondent. 900 P.2d at 261-62; Tr. 558:3-8, 1116:1-3. Atop the flattened back seat was respondent, semiconscious. 900 P.2d at 262; Tr. 424:5-12, 73:19-25. He lay on his right side, facing away from the front. 900 P.2d at 262. When ambulance attendants arrived, respondent kept asking, "Did you find him?" *Id.* at 263; Tr. 547:20-23, 548:14-16, 1128:22-1130:18. Christianson's handgun was not recovered. Tr. 966:1-25, 1010:17-24, 679:3-681:14.

Respondent was charged with two counts of deliberate homicide under Mont. Code Ann. § 45-5-102 (1991), authorizing punishment of death or ten years to life in prison if the State proves beyond reasonable doubt that a person "purposely or knowingly cause[d] the death of another human being." *See* 900 P.2d at 261, 263.

The State endeavored to meet its burden with circumstantial evidence. It established gunpowder residue was on respondent's hands, *id.* at 262; Tr. 382-84. The bullet that killed Christianson "could have come from thousands of guns with characteristics" like respondent's; the bullet that killed Pavola was not recovered. 900 P.2d at 262; Tr. 102, 148:3-15.

The State adduced considerable "evidence which reflected on [respondent's] ability to shoot Pavola and Christianson despite his level of intoxication." 900 P.2d at 265. Through the direct testimony of Chief of Detectives Bernall jurors first learned that respondent's blood-alcohol concentration, or BAC, was .36 percent. Tr. 849. State witnesses also testified that respondent was "yelling obscenities" at the time he was found and that an hour later, he "was intoxicated, combative and cursing profusely." 900 P.2d at 262; *see* Tr. 478:57, 506, 533, 539-40. The State called Detective Gassett, who testified that officers tried "to physically restrain" respondent, who "continued to act wildly" for hours. 900 P.2d at 262; *see* Tr. 690, 692, 696-99, 701. It elicited that when respondent's photograph was taken he kicked the camera, indicating, in the lay opinion of Detective Gassett, that respondent's "coordination was good." 900 P.2d at 262.

When the State rested respondent moved to dismiss, arguing that given respondent's high BAC, the State had not proved he acted knowingly or purposely; indeed, it had not proved respondent acted at all. Tr. 954-56. The motion was denied. *Id.*

Before the jury respondent again challenged the State's theory that he had, knowingly and purposely, caused the deaths. He elicited, for example, that the gunpowder residue was inconsistent with the State's theory that he had shot the gun, yet consistent with respondent's position that he had not committed the acts but had lain prone in the car during the shootings. *Id.* at 555:23, 557:3-5, 565:24-566:1, 804:7, 806:18, 808:16.

To that same end respondent adduced evidence establishing the effects of his prodigious alcohol intake. Examination of an emergency technician restated that a

hospital test had measured respondent's BAC at .36. *Id.* at 990. The local physician who had examined respondent testified that respondent,

> judging from his blood alcohol level and his behavior, probably suffered from alcoholic 'blackout' at some point in time and for some period of time prior to the time of . . . examination. He also testified that an intoxicated person experiencing such a blackout may walk, talk, and fully function, with people around the person unable to tell that the person experienced a blackout.

900 P.2d at 263; Tr. 1042-47. Corroborating the physician's opinion about an alcoholic blackout was respondent's own testimony that he did not remember much of what happened after sundown, when he was still at the party. 900 P.2d at 262; Tr. 1108-34. He had a memory that he and Christianson – but not Pavola – had sat on a hill somewhere, passing a bottle of whiskey back and forth. 900 P.2d at 262. He did not remember leaving the party, being in the station wagon, the shootings, his comments to ambulance attendants, or events at the hospital. *Id.* at 262-63.

Rebutting the State's accusation that he had purposely and knowingly killed Pavola and Christianson, respondent used evidence of his intoxication to show that: (1) "his level of intoxication precluded him from undertaking the physical tasks necessary to have committed the homicides"; and (2) "he suffered from an alcoholic blackout which prevented him from recalling the events of the night in question." Brief for Petitioner State of Montana ("Pet. Brf.") at 9; *see* 900 P.2d at 264.

Despite this framing of issues, the State asked that jurors be given the following:

INSTRUCTION NO. 11

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the Defendant proves that he did not know that it was an intoxicating substance when he consumed the substance causing the condition.

Petition for Writ of Certiorari at 29a; *see* 900 P.2d at 263. Respondent objected, contending that the instruction, a nearly verbatim recitation of Mont. Code Ann. § 45-2-203 (1991),[1] was irrelevant and would unconstitutionally deprive respondent of process due him. Respondent's Brief in Opposition to Petition for Certiorari at 2; *see* 900 P.2d at 263. The trial court overruled the objection, and respondent was convicted and sentenced to eighty-four years in prison. 900 P.2d at 261, 263.

The Montana Supreme Court reversed. *Id.* at 267. Even though respondent had raised no affirmative defense related to intoxication, it reasoned, evidence of his .36 BAC "was relevant to the issue of whether

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[1] As amended in 1987, Section 45-2-203 provides:

> Responsibility – intoxicated condition. A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition.

See 900 P.2d at 264.

[respondent] acted knowingly and purposely," and the instruction "precluded the jury from considering it for that purpose." *Id.* at 264-65. In effect, the instruction permitted jurors to consider evidence of respondent's behavior in support of the State's argument that he knowingly and purposely shot Pavola and Christianson, but not to consider respondent's counterevidence on those issues. Instructing "that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense," *id.* at 263, may have misled jurors "into believing the State has proved the mental state beyond a reasonable doubt and that is why defendant cannot introduce evidence in opposition," *id.* at 266. The instruction thus violated respondent's fundamental due process " 'right to a fair opportunity to defend against the State's accusations,' " *id.* at 265 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973)). The court held that portion of Section 45-2-203 barring such consideration unconstitutional, and remanded for a new trial. *Id.* at 266-67.

SUMMARY OF ARGUMENT

In this case the Court confronts the unconstitutionality of an instruction that, pursuant to State statute, told jurors they could not consider evidence of voluntary intoxication as it relates to respondent's arguments. The instruction deprived respondent of the fundamental right to a meaningful opportunity to defend himself against the State's accusations, a right this Court repeatedly has enunciated. Scrutiny of three segments reveals that Instruction 11, based on Mont. Code Ann. § 45-2-203 (1991), compelled jurors to convict despite persuasive evidence that respondent did not commit the crimes. As

the Montana Supreme Court recognized in reversing the convictions, precluding jury evaluation of the defense position violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Arguments in favor of petitioner's self-described "policy choice" fail to justify this deprivation. Instruction 11 deviates from the deeply rooted, consistent Anglo-American tradition defining crime as the concurrence of act and will. That history is far stronger than less consistent rules that excluded evidence of intoxication out of concern, no longer valid given modern technology, that defendants might feign disabling intoxication.

The instruction is also irrational and arbitrary. It tells jurors to ignore medically recognized evidence of a defendant's inability to act knowingly or voluntarily, indeed of defendant's inability to act at all, if that inability stems from "voluntary intoxication." The instruction thus unreasonably defies medical consensus that one can be fully disabled, both mentally and physically, at the levels of intoxication at issue in this case.

Finally, the opinion below poses no more threat to evidence law than did this Court's precedents articulating the right to defend against the State's charges. Because that right was denied in an unconstitutional, arbitrary manner, the Court should affirm.

ARGUMENT

I. THE INSTRUCTION BARRING JURY CONSIDERATION OF RESPONDENT'S INTOXICATION COMPELLED A CONVICTION THAT IS FUNDAMENTALLY UNFAIR AND VIOLATIVE OF THE DUE PROCESS CLAUSE.

This Court granted review to answer the following question:

> Is a criminal defendant deprived of due process under the Fourteenth Amendment to the United States Constitution when a jury is instructed, pursuant to a state statute, that the jury may not consider evidence of the defendant's voluntary intoxication in determining the existence of a mental state which is an element of the criminal offense?

Pet. Brf. at i.

In one sense, the case at bar does not squarely present that question. Respondent James Allen Egelhoff did not seek to excuse or to justify killings committed while intoxicated on the theory that his intoxication rendered his acts neither purposeful nor knowing. *Id.* at 9. Rather, respondent adduced evidence that he had consumed a sometimes lethal dose of alcohol[2] to show that he simply could not have committed the crimes charged. *Id.* Thus, arguments of petitioner and its *amici curiae* that a State has near-absolute power to bar a defendant from adducing intoxication evidence as an excuse or justification are beside the point.

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[2] *See* Diagnostic and Statistical Manual of Mental Disorders 203 (4th ed. 1994) ("DSM-IV"); Mont. Hwy. Traffic Safety Div., Dept. of Justice, "BAC and You," attached as Appendix A ("App. A").

In another sense, this case presents the question in starkest relief. The contested instruction, an overbroad application of Mont. Code Ann. § 45-2-203 (1991), told jurors to ignore intoxication as it related to respondent's strong claims of actual innocence.[3] It thus compelled convictions that are fundamentally arbitrary and unfair, in violation of the Due Process Clause. This Court should affirm the Montana Supreme Court's reversal and let respondent's case proceed to a new and fair trial.

II. PETITIONER'S "POLICY CHOICE" CANNOT SURVIVE TRADITIONAL DUE PROCESS CLAUSE SCRUTINY.

The people of the United States vest in this Court the power and the duty to void State acts that violate our Federal Constitution. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 326-27 (1819); U.S. Const., arts. III, VI. It is against this backdrop that the repeated allusions of petitioner and its *amici* to States' policy-making role must be evaluated.[4] For although our Federal system entitles a State to " 'serve as a laboratory; and try novel social and economic experiments,' " it does not give it "the power to experiment with the fundamental liberties"

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[3] Respondent contended that he was actually innocent because he had not committed the shootings at all, let alone committed them knowingly and purposely. *See supra* at 3-5; *infra* at 15-19 & n. 7.

[4] *See* Pet. Brf. at 17-18; Brief for the United States ("U.S. Brf.") at 6, 8; Brief of the States of Hawaii, *et al.* ("States' Brf."), at 14-15; Brief *Amicus Curiae* of the Criminal Justice Legal Foundation ("CJLF Brf.") at 3-5, 8; Brief of The American Alliance for Rights and Responsibilities, *et al.*("AARR Brf."), at 2-4, 13.

protected by the Constitution. *Pointer v. Texas*, 380 U.S. 400, 413 (1965) (Goldberg, J., concurring) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting)). Thus this Court, even as it recognizes the importance of law enforcement to States' sovereign mission, does not shirk from striking experiments that violate principles "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), or otherwise deprive a defendant of rights "fundamental and essential to a fair trial," *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (internal quotation omitted), within our "American scheme of justice," *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). The Court invalidates such efforts pursuant to the Due Process Clause of the Fourteenth Amendment. *See, e.g., Griffin v. California*, 380 U.S. 609 (1965) (comment on failure to testify violated privilege against self-incrimination); *Gideon*, 372 U.S. at 342-45 (denial of counsel).

To determine whether a State secured a conviction in a fundamentally unfair manner, the Court examines numerous factors. Often it relies on analogous guarantees against Federal abuse enumerated in the Bill of Rights. *E.g., Duncan*, 391 U.S. at 148-49; *Washington v. Texas*, 388 U.S. 14, 17-23 (1967). It also assesses links between rights a defendant asserts and procedural due process guarantees. *E.g., Pointer*, 380 U.S. at 405. Rights subsumed in these guarantees also have been held fundamental; for example, the right to defend completely against the State's charges, *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), and the right to have that defense be considered by a jury, the sole arbiter of guilt or innocence, *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2080-81 (1995). The Court considers history and policy rationales, yet will not countenance a

practice that conflicts with American constitutional values. *E.g., Washington*, 388 U.S. at 19-23; *Palko*, 302 U.S. at 327 (Court will override practices irrational to the point of being "oppressive and arbitrary").

Petitioner, even while seeking this Court's imprimatur, concedes that the unusual "policy choice" by which it obtained these convictions cannot stand if it is irrational, unsupported by history and tradition, or otherwise exceeds the boundaries of the Due Process Clause.[5] Pet. Brf. at 35-36; *see also, e.g.*, U.S. Brf. at 6, 25 n. 15; CJLF Brf. at 26; AARR Brf. at 16. Those bounds were exceeded here when jurors were instructed to disregard evidence of intoxication in a way that removed from consideration issues essential to a fair verdict.

A. The Instruction Violated the Fundamental Due Process Right to Present a Defense for Jurors' Consideration.

Securely within the scope of fundamental due process lies the right to " 'a meaningful opportunity to present a complete defense,' " *Crane*, 476 U.S. at 690 (quoting

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[5] Petitioner avers that its policy "simply" treats a "voluntarily intoxicated" person the same as "a comparably-situated sober" person "by removing intoxication as a factor to be considered by the fact finder." Pet. Brf. at 17. The stated classification brings to mind the Equal Protection Clause of the Fourteenth Amendment. As in the due process context under review, this Court has not hesitated to invalidate classifications that, while embodying a State's "policy choice," could not be justified. *E.g., Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking State law, based on eugenic theory that criminal behavior is inherited, which subjected persons thrice convicted of certain felonies, but not those convicted of other, similar felonies, to compulsory sterilization).

California v. Trombetta, 467 U.S. 479, 485 (1984)); that is, to "defend against the State's accusations," *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). It encompasses guarantees enumerated in the Sixth Amendment and applied to the States by means of the Fourteenth Amendment; for example, the defendant's right not only "to have compulsory process for obtaining witnesses in his favor," *Washington*, 388 U.S. at 18, but also "to confront the witnesses against him," *Pointer*, 380 U.S. at 403. As a necessary component of the latter, a defendant must be afforded "a complete and adequate opportunity to cross-examine" adverse witnesses. *Id.* at 406-07. The defendant's "basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing,' " *Crane*, 476 U.S. at 690-91 (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984)), also bears strong relation to procedural due process guarantees of " 'an opportunity to be heard in his defense – a right to his day in court' " – by means of, " 'as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel,' " *Pointer*, 380 U.S. at 405 (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)). *See also Crane*, 476 U.S. at 690; *Washington*, 388 U.S. at 18. The right is " 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' " *Pointer*, 380 U.S. at 405, *quoted in Chambers*, 410 U.S. at 295.

Intertwined is the fundamental right to a jury trial, including "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty' . . . beyond reasonable doubt." *Sullivan*, 113 S. Ct. at 2080-81 (citing "interrelated" Fifth and Sixth Amendment roots); *see United States v. Gaudin*, 115 S. Ct.

2310, 2313-16 (1995). A defendant's efforts to resist the State's case and to offer his defense cannot be meaningful unless the jury is allowed to weigh those efforts in its deliberations. Among the precedents illustrating this point are *Chambers v. Mississippi*, 410 U.S. 284 (1973), on which the court below relied in concluding that this respondent's trial was fundamentally unfair, *Egelhoff*, 900 P.2d at 265, and *Washington v. Texas*, 388 U.S. 14 (1967).

In *Chambers*, the State tried a defendant for murdering a police officer who tried to arrest a youth amid "a hostile crowd," 410 U.S. at 285. The defendant, who maintained that he had not fired the fatal shots, sought to show that another man, McDonald, had confessed four times to the killing. *Id.* at 287-89. Although allowed to call McDonald, the defendant was barred by application of State law from cross-examining McDonald, who had recanted, or from calling witnesses to whom McDonald had confessed. *Id.* at 289-94. These preclusions "effectively prevented" a challenge to McDonald's recantations, *id.* at 297, making the defendant's contention that he was not the killer "far less persuasive than it might have been," *id.* at 294. The preclusions violated due process by denying the defendant his rights to confront and cross-examine adverse witnesses and to call witnesses in his favor. *Id.* at 295, 298-303. This Court reversed, expressing concern that the preclusions subverted jurors' ability to discharge their duty to sift evidence in search for the truth. *Id.* at 295, 303.

As in *Chambers*, the defendant in *Washington* maintained that he did not commit the malice-murder with which the State had charged him. 388 U.S. at 16. He sought to call Fuller, who would corroborate the defendant's testimony that Fuller had committed the shooting,

despite the defendant's efforts to stop him. *Id.* Pursuant to State law allowing coparticipants to testify against, but not for, a defendant, the request was denied. *Id.* at 16-17. This Court concluded that the denial rendered the defendant's right to compulsory process "futile" by preventing his "use" of Fuller, a favorable witness whose testimony was "relevant," "material," and "vital to the defense." *Id.* at 16, 23. It reversed the conviction obtained by blocking consideration of "the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Id.* at 19, 23.

Petitioner and its *amici* try to dilute the force of such precedents by asserting that this case does not involve a claim of actual innocence. Pet. Brf. at 13-14, 33, 36; States' Brf. at 7 & n. 6. *See* U.S. Brf. at 25-26 n. 15; CJLF Brf. at 6. Doubtless they seek to avert the special care this Court accords innocence claims that were obscured by unconstitutional trial errors. *E.g., Schlup v. Delo*, 115 S. Ct. 851, 860-61 (1995) (obstacles to review of successive habeas petitions must cede to innocence claim coupled with challenges based on constitutional due process doctrines); *Rose v. Clark*, 478 U.S. 570, 578-79 (1986) (denial of right to present innocence defense to jury reversible as structural error). But their assertions are unavailing.

Respondent, like the defendants in *Chambers* and *Washington*, maintained that he did not commit the murders with which the State charged him. Through cross-examination of adverse witnesses, his own testimony, and the testimony of favorable witnesses, respondent, to use petitioner's own words, sought to show that "his level of intoxication precluded him from undertaking the physical tasks necessary to have committed the homicides." Pet. Brf. at 9; *see supra* at 3-5. This same evidence tended,

as the court below recognized, to rebut the State's contentions that respondent committed the acts necessary, and did so knowingly and purposely. *Egelhoff*, 900 P.2d at 264-65. Had jurors been permitted to evaluate it fully, the evidence indeed would have provided grounds for acquittal. *Contra* U.S. Brf. at 26 n. 15. Close scrutiny of three critical segments of Instruction 11 evinces, however, that jurors were enjoined from undertaking that constitutionally mandated evaluation. *Contra* Pet. Brf. at 15-17.

1. 'An Intoxicated Person Is Criminally Responsible.'

Instruction 11's first segment admonished jurors that a "person who is in an intoxicated condition" – as respondent undisputedly was – "is criminally responsible for his conduct," *Egelhoff*, 900 P.2d at 263. A reasonable juror properly could have understood this to be a judicial declaration that respondent was "[a]ble to make moral or rational decisions" and was "answerable" for anything he might have done, regardless of the extent of his intoxication. *See* American Heritage Dictionary of the English Language 1537 (3d ed. 1992). Any conviction based on this understanding would violate settled principles of criminal liability, *infra* at 19-24, and the constitutional due process requirement of rationality, *infra* at 24-27. *Cf. Sandstrom v. Montana*, 442 U.S. 510, 517-19 (1979) (reversing because reasonable juror "could well have been misled" to unconstitutional result).

2. 'Intoxication Is No Defense to Any Offense.'

Next jurors were instructed that "an intoxicated condition is not a defense to any offense," 900 P.2d at 263.

The opinion below does not address this language from Mont. Code Ann. § 45-2-203 (1991), construing it to refer only to an affirmative defense, none of which was raised at trial.[6] This Court, however, ascribes a wider meaning to "defense." *E.g., Chambers*, 410 U.S. at 294 (term encompasses challenge to State's accusations). Likewise, a juror unaware of the concept of an affirmative defense reasonably could have interpreted the term more broadly. Ordinary meanings of "defense" include the "act of defending against attack," a "means or method of defending," and, in a legal context, the "action of the defendant in opposition to complaints against him," American Heritage Dictionary of the English Language 489 (3d ed. 1992). Reasonable jurors thus could have understood this segment to instruct them not to consider the evidence of intoxication to support points respondent made to defend himself against the State's charges. They thus would have ignored the physician's opinion and respondent's own

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[6] *See Egelhoff*, 900 P.2d at 264, 267-68 (Nelson, J., specially concurring). After correctly recognizing that no affirmative defense is at issue, the court below went awry in discussing *Martin v. Ohio*, 480 U.S. 228 (1987). *Egelhoff*, 900 P.2d at 265. The opinion in *Martin* reviews whether a State may treat self-defense – historically treated as a justification or excuse, *see* 4 W. Blackstone, Commentaries 183-84 (1769) ("Blackstone") – as an affirmative defense. 480 U.S. at 233. That has no bearing on the question at bar; that is, whether a State may deny a defendant of an opportunity to challenge its charges against him.

Disregarding this critical distinction, petitioner and *amici* devote portions of their briefs to affirmative defenses of excuse. *E.g.*, Pet. Brf. at 18 ("exculpatory excuse"); U.S. Brf. at 6-9, 11, 18-20 (referring to "excuses" like diminished capacity and entrapment); CJLF Brf. at 11, 17; AARR Brf. at 8, 22 (excuses like diminished capacity). Those discussions are beside the point here.

testimony that he probably had suffered an alcoholic blackout at the time of the shootings, which occurred in the hours before he was found prone in the station wagon. *See Egelhoff*, 900 P.2d at 262-63. Jurors would have remained free, however, to apply all the intoxication evidence to support the State's theories of the offense.

3. 'Intoxication Is Not To Be Considered in Determining Existence of Mental State.'

Instruction 11 continued: "and [an intoxicated condition] may not be taken into consideration in determining the existence of a mental state which is an element of the offense," 900 P.2d at 263. Read in conjunction with the language just discussed, this segment reasonably might have been construed to tell jurors to consider the intoxication evidence the State adduced to show respondent's mindset on the night of the shootings, but to ignore respondent's use of intoxication to rebut those same arguments. Furthermore, jurors might well have found it difficult to separate "mental state" elements from other elements of the offense of deliberate homicide. Indeed, such a separation would run counter to Montana law, which provides that the mental state set forth in a penal statute applies to each element of the offense.[7]

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[7] With two narrow exceptions not related to the case at bar, Montana law states that

> a person is not guilty of an offense unless, *with respect to each element* described by the statute defining the offense, a person *acts while having one of the mental states*. . . .

Mont. Code Ann. § 45-2-103(1) (1995) (emphasis added). Section 45-2-103(4) operates to apply the "knowingly or purposely"

Read together, these three segments told jurors to consider intoxication in support of the State's but not respondent's position, giving the State an unfair advantage like that decried in *Washington*, 388 U.S. at 16-17, 19. By ordering jurors to disregard vital, persuasive evidence of actual innocence for the sole reason that it related to intoxication, the instruction denied respondent his right to have jurors evaluate his challenge to the State's charges as effectively as if he had not been allowed to elicit any such evidence. *See id.* at 16; *see also Chambers*, 410 U.S. at 294, 297. It deprived respondent of the right to have jurors, and not the judge, find every fact essential to conviction beyond reasonable doubt. *See Sullivan*, 113 S. Ct. at 2080-81; *In re Winship*, 397 U.S. 358, 364 (1970). As discussed below, this deprivation of fundamental rights was irrational and unsupported by history, and thus fundamentally unfair.

B. History Does Not Justify This Deprivation of Rights Fundamental to a Fair Trial.

Petitioner and its *amici* advance two arguments based on legal history in an effort to justify denying respondent a full opportunity to defend himself. First, they argue that the law permits elimination of the mental-state requirement, even imposition of strict liability, if a defendant was voluntarily intoxicated. *See* Pet. Brf. at 29, 34; States' Brf. at 10; AARR Brf. at 5. Second, they argue that

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mental state prescribed for deliberate homicide in violation of § 45-5-102(1)(a) "to each element" of the offense. In effect, an argument that a person did not knowingly or purposely do an act is equivalent to an argument that the person did not do the act proscribed.

a common-law rule allows ordering jurors to ignore intoxication even if it would disprove the State's charges that a defendant acted knowingly and purposely. Pet. Brf. at 13, 19-20; U.S. Brf. at 20 & n. 10; States' Brf. at 14; CJLF Brf. at 9, 19; AARR Brf. at 8-9. As shown below, neither argument justifies the policy choice embodied in Instruction 11.

1. Longstanding Tradition Bars Strict Liability in Cases of Infamous, Common-Law Felonies.

An entrenched legal principle defines crime as the concurrence of guilty act, or *actus reus*, and guilty mind, *mens rea*. Reflecting the principle's long pedigree is the Latin canon *actus non facit reum, nisi mens sit rea*.[8] Leading Eighteenth Century commentators embraced the principle, "enshrined in the common law."[9] It endured in the

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[8] E. Coke, The Third Part of the Institutes of the Law of England 6, 107 (1797) ("Coke"). In English, it states, "An act does not make [the doer of it] guilty, unless the mind be guilty; that is, unless the intention be criminal. The intent and the act must both concur to constitute the crime." Black's Law Dictionary 36 (6th ed. 1990).

[9] P. Brett, An Inquiry into Criminal Guilt 38 (1963). Sources Brett cites, *id.* at 37-41, include: M. Foster, Crown Law 279 (3d ed. 1809) (citing Latin axiom that translates as "crime is not completed unless a guilty will is interposed"); Blackstone, *supra*, at 21 ("[T]o make a complete crime cognizable by human laws, there must be both a will and an act. . . . And, as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will; and secondly, an unlawful act consequent upon such will."); 1 W. Hawkins, Pleas of the Crown 1 (1716) ("The Guilt of offending against any Law whatsoever,

mid-Nineteenth Century, when the Fourteenth Amendment was ratified, as the Court itself recognized in *Morissette v. United States*, 342 U.S. 246, 251 (1952).[10] *See also* 1 J. Bishop, Commentaries on the Criminal Law § 227, at 260 (2d ed. 1858).

Indeed, in *Morissette* this Court traced the principle from ancient Greek and Biblical through modern times. 342 U.S. at 250-53 & n. 4. "[T]hat an injury can amount to a crime only when inflicted by intention," the Court wrote,

> is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. . . . [It] has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Id. at 250-51 (footnote omitted). This Court followed "an unbroken course of judicial decision in all constituent states of the Union" to hold that intent to steal was an essential element of a theft statute that proscribed certain acts but articulated no *mens rea*. *Id.* at 261-62 & n. 19.

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necessarily supposing a wilful Disobedience thereof, can never justly be imputed to those who are either uncapable of understanding it, or of conforming themselves to it")).

[10] Petitioner's penal code still follows this tradition, defining crime as a concurrence of proscribed act and a requisite state of mind. Mont. Code Ann. § 45-2-103(1) (1995). It specifies that a "material element of every offense is a voluntary act," *id.* § 45-2-202, and forbids punishment based on an involuntary "reflex or convulsion," "bodily movement during unconsciousness or sleep," or "bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual," *id.* § 45-2-101(32).

Because the jury instructions had precluded consideration of this "ingredient of the crime charged," it reversed. *Id.* at 274-76.

Instruction 11 and Section 45-2-203, by compelling convictions of intoxicated defendants without proof beyond reasonable doubt of both guilty act and guilty mind, run counter to the principle reaffirmed in *Morissette*. Petitioner and its *amici* urge the Court to follow opinions they contend allow elimination of a *mens rea* element, pretermitting that *Morissette* itself explains why such strict-liability cases do not apply.[11]

As the Industrial Revolution exposed newly urbanized workers and consumers to mass health and safety hazards, the Court wrote, the law began to hold criminally liable, without proof of criminal intent, persons deemed to have violated a special duty not to cause harms related to those hazards. *Id.* at 253-61. But such absolute liability was limited to novel crimes "in the nature of neglect where the law requires care, or inaction where it imposes a duty" to the public, and not of "immediate," "positive aggressions" against a person, "with which the common law so often dealt," *id.* at 255-56. These " 'public welfare' " offenses carried small penalties and little stigma from conviction. *Id.*

The Court's refusal to conclude that Congress intended to apply the strict-liability doctrine to larceny,

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[11] Among the opinions on which they rely is *United States v. Dotterweich*, 320 U.S. 277 (1943). Pet. Brf. at 29, 34; States' Brf. at 10; AARR Brf. at 5. In so doing, they necessarily concede the pertinence of *Morissette*, in which this Court distinguished *Dotterweich*. 342 U.S. at 260.

"among the earliest offenses known to the law that existed before legislation,"[12] pertains here. Although in its narrowest sense the holding was one of statutory construction, it rested on a long-held, consistently followed, Anglo-American tradition of fairness, the same tradition that guides this Court's fundamental due process jurisprudence. *See infra* at 11. Application of that tradition here bars petitioner from using the absolute-liability doctrine to obtain a conviction for deliberate homicide, a crime that brings direct, irrevocable injury to an identified victim; that destroys a defendant's reputation; that may result in punishment by death; and that is, "of all felonies . . . the most hainous" at common law.[13] *See* Coke, *supra*, at 47.

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[12] *Id.* at 260. Petitioner's penal code comports with this principle by requiring a concurrence of act and intent, Mont. Code Ann. § 45-2-103(1) (1995), and by banning strict liability in crimes punishable by more than $500 absent "clearly indicate[d] . . . legislative purpose to impose absolute liability," *id.* § 45-2-104.

[13] Nothing in *Powell v. Texas*, 392 U.S. 514 (1968), compels a different conclusion. Under review was a bench conviction for public intoxication, a petty offense punished by a $20 fine. *Id.* at 517. The Court declined to hold, on the "utterly inadequate" record before it, that conviction of a defendant with "chronic alcoholism" would violate the Eighth and Fourteenth Amendments. *Id.* at 521, 536-67. Even assuming that the reference, without citation of authority, to "shifting adjustment" in offenses, *id.* at 535-36, allows leeway for minor offenses like that under consideration, the passage does not preclude application of the principles set forth in *Morissette* to an infamous crime carrying maximum stigma and punishment. *Contra* Pet. Brf. at 34; U.S. Brf. at 9; CJLF Brf. at 4-5; AARR Brf. at 16. Underlying *Powell*, moreover, is the settled premise that the Court has the power and duty to strike a State practice that violates the Fourteenth Amendment. *See infra* at 9-11.

2. Outdated Intoxication Rules Do Not Justify This Denial.

Petitioner and its *amici* also invoke an old common-law rule barring evidence of intoxication. Pet. Brf. at 13, 19-20; U.S. Brf. at 20 & n. 10; States' Brf. at 14; CJLF Brf. at 9, 19; AARR Brf. at 8-9. Assuming *arguendo* the rule was followed at common law,[14] it cannot justify the deprivation this respondent suffered by application of Instruction 11.

As petitioner and its *amici* concede, by the mid-Nineteenth Century some jurisdictions allowed consideration of intoxication in mitigation of crime. U.S. Brf. at 21; CJLF Brf. at 19-22; AARR Brf. at 9-11; *see* Pet. Brf. at 21; States' Brief at 14. The old common-law rule thus was no longer deeply rooted at the time the Fourteenth Amendment was ratified.

The trend toward some mitigation continued, and it is the majority rule today. AARR Brf. at 12; *contra* Pet. Brf. at 23. *See generally* Appendix B ("App. B") (listing State rules touching on intoxication issue). *Cf. Chambers*, 410 U.S. at 296 n. 9 (noting Federal evidence rules abolished State's policy); *Washington*, 388 U.S. at 17 (noting uniqueness of statute it holds unconstitutional). Furthermore, examination of authorities cited to argue that ten States follow the precise policy petitioner seeks to justify, *see* Brief of States as Amici Curiae in Support of Petition for Writ of Certiorari at 4 n. 1, shows that only three –

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[14] *But see* H. Eckenrode, Revolution in Virginia 148 (1916) (in Virginia at time of American Revolution, "[d]runkenness was 'regarded by the Fathers as a palliating circumstance in almost every crime from failure to attend church to treason' "), *quoted in* C.C. Pearson *et al.*, Liquor and Anti-Liquor in Virginia 1619-1919 at 45 (1967).

Delaware, Hawaii, and Missouri – have upheld rules embodying the policy against constitutional due process challenges. Six of the others – Arizona, Arkansas, Georgia, Mississippi, South Carolina, and Texas – have approved preclusion of consideration of intoxication without undertaking constitutional analysis. The remaining State, Pennsylvania, in fact allows such evidence to reduce the degree of a murder charge. *See* App. B.

Grounding the common-law rule, moreover, was a concern that responsible defendants would escape liability by exaggerating the degree and effect of their intoxication. Pet. Brf. at 20; U.S. Brf. at 20 n. 10; AARR Brf. at 8-9. Modern procedures for precise measurement of a person's blood-alcohol concentration have erased that concern. Indeed, petitioner and all States rely on those procedures as the linchpin of their own laws against drinking and driving. *See* App. A; U.S. Dept. of Commerce, Econ. & Statistics Admin., Bureau of Census, Statistical Abstract of the United States 641 (115th ed. 1995) ("Statistical Abstract"). Therefore, the common-law rule should be rejected as an anachronism. *Cf. Washington*, 388 U.S. at 21-22 & n. 18 (in striking rule based on outdated mistrust of jurors' intelligence, Court approved of precedent "refusing to be bound by 'the dead hand of the common-law rule of 1789' ") (quoting *Rosen v. United States*, 245 U.S. 467, 471 (1925)); *cf. also Chambers*, 410 U.S. at 295-97.

The uncertain and outdated common-law rule pales in comparison with the ancient and still valid principle affirmed in *Morissette*. Petitioner thus has failed to justify its deviation from the deeply rooted, traditional definition of crime as the unity of act and will.

C. The Instruction Arbitrarily Denied Due Process.

Petitioner and its *amici* would justify Instruction 11 as a permissible substitution of a required mental state with the immorality of intoxication, and as a deterrent to alcohol-related crime. *See* Pet. Brf. at 17, 35-36; U.S. Brf. at 6, 8, 25 n. 15; States' Brf. at 8, 12; AARR Brf. at 7-8, 16. Both justifications turn a blind eye to the realities of intoxication, realities that render the State's policy unconstitutionally oppressive and arbitrary. *See Palko*, 302 U.S. at 327.

For many persons alcohol intake is an aspect of a recognized medical condition. Of more than a dozen recognized mental disorders related to alcohol, the gravest entail medical conditions that "can affect nearly every organ," "are usually permanent and may worsen even if the substance use stops," DSM-IV, *supra*, at 195, 200, 153. "More persistent central nervous system effects include cognitive deficits, severe memory impairment, and degenerative changes in the cerebellum." *Id.* at 200. A person so afflicted may not be subject to deterrence, and the badness that initiated intoxication long has passed. It defies common sense, *contra* Pet. Brf. at 12, to tell jurors to ignore the person's recognized physical and mental deficiencies, for the sole reason that "voluntary intoxication" caused them. *Cf. Sandstrom*, 442 U.S. at 512, 527 (deliberate-homicide conviction of defendant who argued he could not form intent because of "personality disorder aggravated by alcohol consumption" reversed on ground jurors were told to presume the contrary).

The result in this case is likewise irrational. A test hours after the shootings measured respondent's BAC at .36 percent, meaning that there were three and two-thirds

parts alcohol for every thousand parts blood. *See* App. A. That is three-and-a-half times above the point at which Montana and most other States deem a person under the influence of alcohol, so impairing judgment that the person may not legally drive a vehicle. *Id.*[15] Indeed, more than judgment is hindered. As a brochure from petitioner's Department of Justice explains, at a BAC of .09 to .15 the cerebellum, the brain's "essential link in coordinating sensory impulses and motor activity," is affected. *Id.* At the next tier, .16 to .30, the medulla, "which controls involuntary functions, may be affected," and "[u]nconsciousness may occur." *Id.* Above .30, the tier at which respondent tested,[16]

> most people are not in a position to drink anymore. *They are usually comatose and will remain in a coma until the body has disposed of enough alcohol so that the nerve centers controlling consciousness may begin to function again. It is important to note that persons in this condition are near the point of death and may die if left unattended.*

Id. (emphasis added). *See* DSM-IV, *supra*, at 203 (citing sleep and loss of sensation as effects at "very high" BAC of .20 to .30, and inhibited breathing and pulse, "even death," at .30 to .40).

Far from taking these gradations into account, Instruction 11 required jurors to ignore them. Respondent argued that he was in a blackout – not moving at all,

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[15] *See also* Statistical Abstract, *supra*, at 641. In a fifth of the States, this BAC was four-and-a-half times past that point. *Id.*

[16] In fact, respondent's BAC likely was even higher than .36 at the time the shootings took place. App. A (explaining process by which alcohol is eliminated from the body); DSM-IV, *supra*, at 203.

moving involuntarily, or functioning without comprehension of his movements. *See Egelhoff*, 900 P.2d at 263, Tr. 1042-47. Yet jurors were barred from considering that recognized medical condition as it related to respondent's challenges to the State's accusations, solely because it stemmed from "voluntary intoxication." This made no sense; by the same process a person who, while passed out from drinking, rolled over and smothered another could be convicted of deliberate homicide. Given the absence of *mens rea* or *actus reus*, there would be no crime to deter. Justifications based on immorality would raise serious concerns of proportionality, if used to subject to maximum punishment a person who either caused a death while disablingly intoxicated or was innocent of the killing but, because of alcohol-induced amnesia, could not refute the State's contrary accusation. *Cf. Powell*, 392 U.S. at 528 (citing "brief jail term" as appropriate penalty for petty offense of public intoxication); Mont. Code Ann. § 45-5-102(1)(b) (1995) (designating felonies for which intent may be transferred on felony-murder theory).

In short, by instructing jurors to suspend reality and convict whenever "voluntary intoxication" is the reason a defendant lacked the requisite mental state, or did not act voluntarily and in concurrence with that mental state, the State's policy invites the kind of arbitrary and capricious State action that the Due Process Clause condemns.

III. RECOGNITION THAT THIS PRACTICE VIOLATES TENETS OF DUE PROCESS DOES NOT THREATEN SETTLED EVIDENCE LAW.

In further challenge to the right to defend articulated below, petitioner's *amici* point to the following:

> We conclude that the defendant had a due process right to present and have considered by the jury all relevant evidence to rebut the State's evidence on all elements of the offense charged.

Egelhoff, 900 P.2d at 266. They maintain that the reference to "all relevant evidence" imperils longstanding rules excluding certain evidence.[17] This stated concern, which the instant discussion reveals as a misapprehension of the opinion below, is the sole reason the United States seeks to comment on this case. *See* U.S. Brf. at 1-2. Even cursory inquiry, however, demonstrates that the Montana Supreme Court intended no such radical change.

Amici must assume that "relevant" means only "logically relevant"; that is, that it denotes all evidence bearing a link to a fact to be proved. *See* R. Carlson, *et al.*, Evidence in the Nineties 189, 311 (3d ed. 1991) ("Carlson"); *see also* Fed. R. Evid. 401 & Advisory Committee Note. But "relevant" has another traditional meaning: logically relevant evidence routinely is excluded, for various policy reasons, as not "legally relevant." Carlson, *supra*, at 311-12; *see* J. Strong, McCormick on Evidence § 185, at 341 (4th ed. 1992); 1A J. Wigmore, Evidence § 28, at 969 (Tillers rev. ed. 1983). Fed. R. Evid. 403 and other

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[17] *See* U.S. Brf. at 1-2, 25-26; States' Brf. at 1; CJLF Brf. at 18-19; AARR Brf. at 25. This stated concern, misapprehending the opinion below, is the sole interest articulated by the United States, U.S. Brf. at 1-2, although the bulk of its brief treats other issues.

rules embodying policies limiting evidence fall within this doctrine of legal irrelevancy. Carlson, *supra*, at 311. In this sense, therefore, the reference in the opinion below to "all relevant evidence" has no effect on settled rules of evidence.

Examination of the Montana Rules of Evidence bolsters this conclusion. Mont. Code Ann., tit. 26, ch. 10 (1995) ("Mont. R. Evid."). In effect since 1977, these rules correspond to the Federal Rules of Evidence in numbering, structure, and content. Like the Federal rules, the Montana rules authorize the exclusion of "relevant evidence . . . as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state." Mont. R. Evid. 402; *see* Fed. R. Evid. 402. The Montana and the Federal rules allowing exclusion of logically relevant but unduly prejudicial evidence are identical. *Compare* Mont. R. Evid. 403 *with* Fed. R. Evid. 403. Other rules barring evidence deemed legally irrelevant, as that term is used above, are substantially alike. *Compare, e.g.*, Mont. R. Evid. 404-09, 411 *with* Fed. R. Evid. 404-09, 411. Furthermore, whereas Fed. R. Evid. 501 leaves development of privileges to common law, Montana by statute excludes testimony that falls within explicit privileges ranging from spousal and attorney-client to student-counselor and audiologist-client. *See* Mont. Code. Ann. §§ 26-1-801 to 26-1-903 (1995); *see also* Mont. R. Evid. 501-05.

These embedded State rules barring some logically relevant evidence, coupled with the dual meaning of "relevant," establish that the Montana Supreme Court did not decimate the law of evidence any more than this Court did in its opinions enforcing the constitutional

right to present a defense. *E.g., Washington*, 388 U.S. at 23 n. 21; *see also Chambers*, 410 U.S. at 295.

CONCLUSION

The judgment of Montana Supreme Court, which upheld settled constitutional due process principles, should be affirmed so that this case may proceed to a new and fundamentally fair new trial.

Respectfully submitted,

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February 1996

FACTS

Only time will sober up a drunk.

Cold showers—exercise—black coffee—don't work.

All you have is a wet drunk—a tired drunk—an awake drunk—BUT STILL A DRUNK.

Graphs—charts & graphics and some text reprinted by permission of the American Automobile Association

100,000 copies of this public document were published at an estimated cost of 8¢ per copy, for a total cost of $7,775.85, which includes $7,775.85 for printing and $.00 for distribution.

BAC

Blood Alcohol Concentration

AND YOU

Prepared by

Montana Highway Traffic Safety Division
Department of Justice

WHAT IS BAC?

When a person consumes an alcoholic beverage, the alcohol is quickly and directly absorbed into the bloodstream without being digested, and then distributed to the body cells. As more is taken in, the percentage of alcohol in the blood rises. This alcohol in the blood is called the blood alcohol concentration or BAC. The BAC can be measured accurately by using a breath, urine or blood sample. This measurement indicates parts of alcohol in relation to parts of blood. When the blood alcohol concentration reaches a level of .10%, it means that there is one part alcohol for every thousand parts of blood. In Montana it is unlawful to drive or be in actual physical control of a motor vehicle when the BAC level is .10% or more.

WHAT DETERMINES BAC?

The percentage of alcohol in the blood depends basically on three things:

1. **Body Weight:** A heavier person has more body fluids; therefore can consume more alcohol than a lighter person, and still have the same percentage of alcohol in the blood.
2. **Amount of Alcohol Consumed:** "Standard" drinks all contain the **same amount of alcohol.** A "standard" drink is a 12 ounce can or bottle of beer, a 5 ounce glass of most wines and 1½ ounces (1 shot) of liquor. Beer has 5% alcohol, most wines have 12%, and 80 proof liquor has 40%. Multiply the volume of the drink by the percentage of alcohol in each, and your answer is the amount of alcohol your body is taking in. In these "standard" drinks, each contains .60 ounces of alcohol.
3. **Drinking Time:** The more drinks consumed in a shorter period of time, the higher the BAC. Three drinks in one hour will cause a higher BAC than one drink each hour for three hours.

Eating before or while drinking tends to slow the absorption rate of the alcohol into the bloodstream, but eventually all of the alcohol consumed gets into the blood.

The following chart is a guide to determine various blood alcohol percentages. Use the weight closest to yours.

BAC CHART

After hours	1 Drink				2 Drinks				3 Drinks				4 Drinks			
	4	3	2	1	4	3	2	1	4	3	2	1	4	3	2	1
Weight pounds																
80	–	–	–	.02	–	–	.05	.08	.07	.10	.10	.10	.12	.12	.15	.15
100	–	–	–	.02	–	–	.04	.06	.05	.07	.08	.09	.09	.10	.12	.13
120	–	–	–	.02	–	–	.03	.04	.03	.04	.06	.06	.06	.08	.09	.11
140	–	–	–	.01	–	–	.02	.04	.02	.03	.05	.05	.04	.06	.08	.09
160	–	–	–	.01	–	–	.02	.03	.01	.02	.04	.05	.03	.04	.06	.08
180	–	–	–	.01	–	–	.01	.02	–	.02	.03	.04	.02	.04	.05	.07
200	–	–	–	–	–	–	.01	.02	–	.01	.03	.04	.01	.03	.04	.06

After hours	5 Drinks				6 Drinks				7 Drinks				8 Drinks			
	4	3	2	1	4	3	2	1	4	3	2	1	4	3	2	1
Weight pounds																
80	.17	.17	.19	.20	.19	.22	.22	.25	.25	.27	.27	.30	.29	.30	.32	.33
100	.13	.14	.16	.17	.16	.18	.19	.21	.20	.22	.23	.25	.24	.25	.27	.29
120	.09	.11	.13	.14	.13	.14	.16	.17	.13	.17	.19	.20	.19	.20	.22	.23
140	.07	.09	.10	.12	.10	.12	.13	.15	.13	.14	.16	.17	.15	.17	.18	.20
160	.06	.07	.08	.10	.08	.09	.11	.13	.10	.12	.13	.15	.13	.14	.16	.17
180	.04	.06	.07	.09	.06	.08	.09	.11	.09	.10	.12	.13	.11	.12	.14	.15
200	.03	.04	.05	.06	.05	.07	.08	.09	.07	.09	.10	.12	.09	.10	.13	.13

Numbers equal the percentage of alcohol in the blood. Dash (–) = a trace of alcohol.

Example: A 180 pound person who has consumed 4 drinks in 3 hours will have a BAC level of .04%.

HOW DOES BAC AFFECT BEHAVIOR?

When the alcohol in the bloodstream reaches the brain, it immediately begins to affect the way a person behaves. The effects are present with just one drink. The following BAC levels are based on a 140 pound person who has consumed the alcohol over a short period of time (1-2 hours):

1-2 drinks (.01 to .04 BAC) Affected first are the outer layers of the cerebrum, (area #(1) on the following picture) which contains the centers of association of the brain, e.g. judgment, reason and inhibitions.

3-4 drinks (.05 to .08 BAC) The alcohol now reaches further into the cerebrum, (area #(1) on the following picture). At this point higher motor and sensory areas are affected, causing a decrease in fine skills and a person's ability to respond and perform. People are likely to become noisy, more talkative and moody, but feel more alert and capable. Yet in truth, there has been a reduction in their reaction time, judgment, and ability to respond to emergencies.

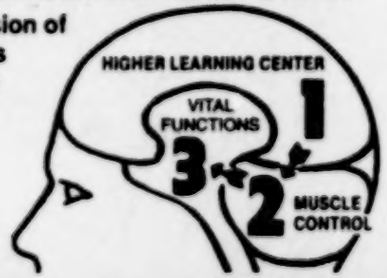
5-7 drinks (.09 to .15 BAC) Now the alcohol extends into the cerebellum, (area #(2) on the following picture) the essential link in coordinating sensory impulses and motor activity. The drinkers' senses of hearing, speech, vision and balance are altered. Decreased sense of pain, staggered walk, and slurred speech may also be evident.

8-12 drinks (.16 to .30 BAC) The entire cerebellum, as well as portions of the medulla (area #(3) on the following picture), which controls involuntary functions, may be affected. Reflexes are depressed, body temperature may go down and circulation is impaired. Unconsciousness may occur. Gross intoxication of all physical and mental faculties is evident.

More than 12 drinks (.30 and above BAC) By this time most people are not in a position to drink anymore. They are usually unconscious and will remain in a coma until the body has disposed of enough alcohol so that the nerve centers controlling consciousness may begin to function again. It is important to note that persons in this condition are near the point of death and **may** die if left unattended.

ALCOHOL AND YOUR BRAIN

Progression of Alcohol's Sedative Effects



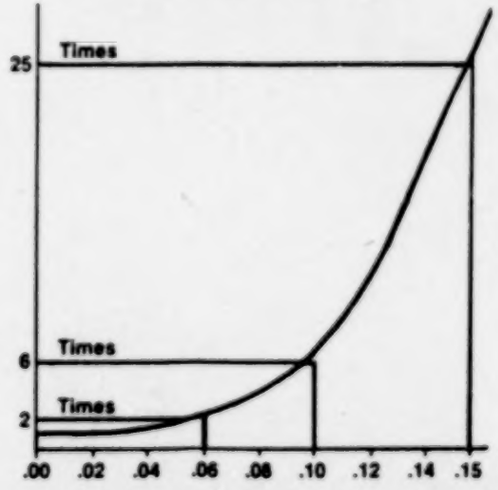
BAC AND DRIVING

If you drink and drive you automatically increase the risk of becoming involved in an accident. The more you drink, the greater the risk becomes. Certain standards have been adopted to identify drinking drivers. They are:

.01 to .05% BAC	A driver is **affected**. Chances of an accident increase.
.05 to .10% BAC	A driver is **impaired**. Chances of an accident double. At this BAC level the driver **could** be arrested for DUI.
.10% BAC	A driver is **intoxicated**. Chances of an accident are 6 times greater. Driver is also considered legally drunk.
.15% BAC	Chances of an accident are 25 times greater than when sober.

In one-half of all highway fatalities, alcohol is involved. In alcohol-related crashes, about one-half of those killed are not the ones who had been drinking.

BAC and Accidents



BAC AND YOUNG DRIVERS

(16 to 24 age group)

When young drivers drink and drive, they face two relatively new situations . . . **learning to drive** and **learning to drive after drinking.**

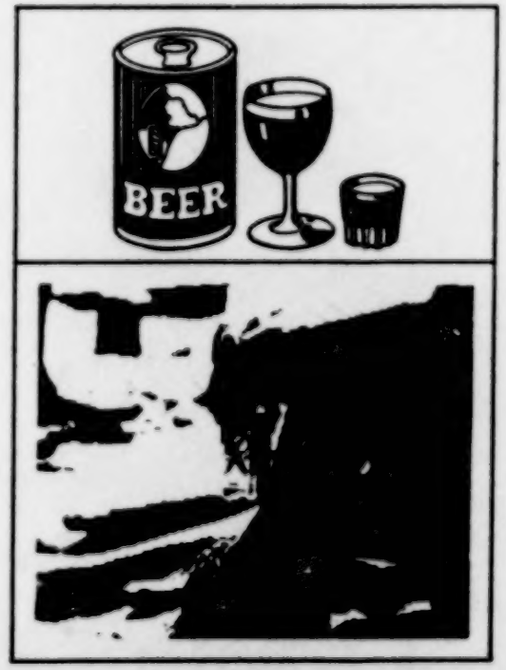
Here are the facts:***

About one fourth of all drivers are under the age of 25, yet they account for over 40% of all accidents, and 47% of all alcohol-related accidents.

Young drivers are involved in 50% more fatal alcohol-related accidents than other drivers.

70% of the young persons killed each year are a result of alcohol-related crashes.

(***source: 1983 Montana Highway Patrol Accident records)



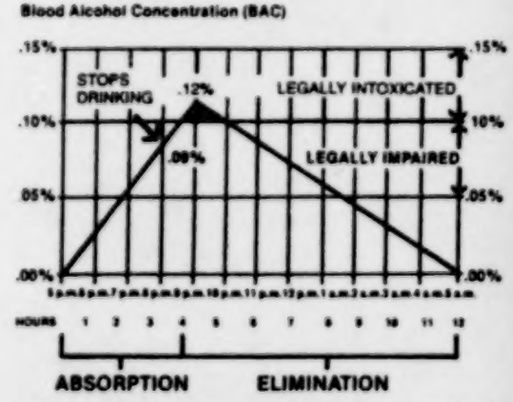
BAC ELIMINATION

It takes 20 to 40 minutes after a drink has been consumed for all of the alcohol to be absorbed into the body. Because of this, when you stop drinking, your BAC will continue to rise for a period of time.

An average person's body will eliminate alcohol at the rate of .015% BAC per hour. This is done through breathing, sweating and through the liver. However, the liver must handle 90% of the alcohol elimination, and the liver never changes speed, so the rate of elimination remains constant. As a result of this slow elimination process, a person remains intoxicated and/or impaired for an extended period of time.

When the BAC level has reached its highest point and starts to decline, people perceive themselves as being more sober than they really are. They use their highest BAC level as their reference point—not when they were sober. BE CAREFUL!

ELIMINATION RATE*



*150 POUND PERSON DRINKING ON AN EMPTY STOMACH CONSUMES 6 DRINKS IN 3 HOURS

APPENDIX B – STATE RULES

Alabama Criminal Code Annotated (1994)
Sec. 13A-3-2. Intoxication

• • • •

Alaska Statutes Annotated (1995)
Sec. 11.81.630. Intoxication as a defense

• • • •

Arizona Revised Statutes Annotated (1995)
Sec. 13-503. Effect of Intoxication; consideration by the jury.

• • • •

Arkansas Penal Code Annotated (1995)
Sec. 5-2-207. Intoxication.

• • • •

California Penal Code Annotated (1995)
Sec. 19.6(22). Evidence of voluntary intoxication.

• • • •

Colorado Revised Statutes Annotated (1989)
Sec. 18-1-804. Intoxication

• • • •

Connecticut General Statutes (recodified 1995)
Sec. 53a-7. Intoxication

• • • •

Delaware Penal Code Annotated (1995)

Title 11, sec. 421. Voluntary intoxication.

Title 11, sec. 423. Involuntary intoxication as a defense.

Title 11, sec. 424. Definitions relating to intoxication.

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Florida Statutes Annotated (1995 ed.)
Sec. 3.04(g). Voluntary Intoxication (Instruction)

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Georgia Criminal Code Annotated (1995)
Sec. 26-704. Intoxication.

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Hawaii Revised Statutes Annotated (1987)
Title 37, sec. 702-230. Intoxication.

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Idaho Code (1995)
Sec. 18-116. Intoxication no excuse for crime.

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Illinois Annotated Statutes (1989)
Chapter 720, sec. 5/6-3. Intoxication or drugged condition.

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Indiana Code Annotated (1995)
35-41-3-5. Intoxication

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Iowa Penal Code Annotated (1995)
Sec. 701.5. Intoxicants or drugs.

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Kansas Statutes Annotated (1995)
Chapter 21, sec. 21-3208. Intoxication

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Kentucky Revised Statutes Annotated (1994)
Sec. 501.080. Liability – Intoxication.

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Louisiana Revised Statutes Annotated (1995)
Tit. 14, sec. 15. Intoxication.

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Maine Revised Statutes Annotated (1995)
17-A-M.R.S.A., Sec. 37

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Maryland
Hook v. Maryland, 315 Md. 25, 553 A.2d 233 (1989) (voluntary intoxication defense to specific intent crimes).

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Massachusetts
Massachusetts v. Freiberg, 405 Mass. 282, 540 N.E.2d 1289 (voluntary intoxication is a defense to specific intent crimes), cert. denied, 493 U.S. 940 (1989).

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Michigan
Michigan v. Garcia, 398 Mich. 250, 247 N.W.2d 547 (1976) (voluntary intoxication is a defense to specific intent crimes).

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Minnesota Statutes Annotated (1995)
Title 40, sec. 609.075. Intoxication as defense.

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Mississippi
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Missouri Revised Statutes (1995)
Sec. 562.076. Intoxicated or Drugged Condition

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Nebraska
Nebraska v. Lixey, 238 Neb. 540, 471 N.W.2d 444 (1991) (voluntary intoxication is relevant to mental state).

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Nevada Revised Statutes Annotated (1991)
Sec. 193-220. Voluntary intoxication no excuse for crime; when it may be considered.

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New Hampshire Revised Statutes Annotated (1986)
Title 62, sec. 626: 4. Intoxication.

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Sec. 2C: 2-8. Intoxication

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New Mexico
New Mexico v. Privett, 104 N.M. 79, 717 P.2d 55 (1986) (voluntary intoxication is defense to specific intent).

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New York Penal Law Annotated (1992)
Sec. 15.25. Effect of intoxication upon liability.

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North Carolina
North Carolina v. Mash, 328 N.C. 61, 372 S.E.2d 532 (1988) (voluntary intoxication relevant to specific intent).

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North Dakota Century Code Annotated (1985)
Sec. 12.1-04-02. Intoxication.
12.1-04-04. Evidence of intoxication is admissible whenever it is relevant to negate or to establish an element of the offense charged.

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Ohio
Ohio v. Fox, 68 Ohio St.2d 53, 428 N.E. 2d 410 (1981) (voluntary intoxication relevant for specific intent crimes).

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Oklahoma Statutes Annotated (1983)
Title 21, sec. 153. Intoxication no defense.

But see Valdez v. Oklahoma, 900 P.2d 363, 379 (Okl.Cr. 1995).

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Oregon Revised Statutes Annotated (1990)
Sec. 161.125. Intoxication; drug or controlled substance dependence as defense.

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Pennsylvania Statutes Annotated (1983)
Title 18, sec. 308. Intoxication or drugged condition.

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Rhode Island
Rhode Island v. Sanden, 626 A.2d 194 (R.I. 1993) (voluntary intoxication relevant to specific intent).

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South Carolina
South Carolina v. Vaughn, 232 S.E.2d 328 (1977) (voluntary intoxication not a defense).

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South Dakota Codified Laws Annotated (1988)
Sec. 22-5-5. Voluntary Intoxication – Crimes involving motive or intent.

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Tennessee Code Annotated (1991)
Sec. 39-11-503. Intoxication.

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Texas Penal Code Annotated (1974)
Sec. 8.04. Intoxication.

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Utah Code Annotated (1990)
Sec. 76-2-30-6. Voluntary intoxication.

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Vermont
Vermont v. Dennis, 151 Vt. 223, 559 A.2d 670 (1989) (voluntary intoxication relevant to specific intent).

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Virginia
Hatcher v. Virginia, 241 S.E.2d 756 (Va. 1978) (voluntary intoxication relevant to specific intent crimes).

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Washington Revised Code Annotated (1988)
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West Virginia
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Wisconsin Statutes Annotated (1995)
Chapter 939, sec. 42. Intoxication.

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Wyoming Statutes Annotated (1995)
Title 6, sec. 6-1-202. Being under the influence not a defense; effect upon intent; "self-induced."
